

**LUCAS H. WENDEL**  
Claimant

**MORTON BUILDINGS, INC.**  
Respondent

**AMERICAN ZURICH INSURANCE COMPANY**  
Insurance Carrier

## ORDER

Respondent and its insurance carrier (respondent) appealed the March 12, 2015, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge (ALJ) Pamela J. Fuller. W. Walter Craig of Derby, Kansas, appeared for claimant. James P. Wolf of Kansas City, Kansas, appeared for respondent.

## ISSUES

A November 10, 2014, preliminary hearing Order determined claimant sustained a single traumatic low back injury on August 22, 2014, and claimant provided respondent notice on September 23, 2014. The ALJ concluded claimant failed to provide timely notice. The ALJ considered the chiropractic records of Dr. Greene and the medical records of Dr. Hufford, but neither testified.

This Board Member, in a January 12, 2015, Order, found claimant sustained an injury by repetitive trauma on September 22, 2014, the last day he worked for respondent. This Board Member also found claimant gave respondent timely notice on August 22, 2014, or September 23, 2014.

Claimant deposed Drs. Greene and Hufford and a second preliminary hearing was held on March 11, 2015. In her March 12, 2015, preliminary hearing Order for Medical Treatment, the ALJ determined claimant sustained an injury by repetitive trauma arising out of and in the course of his employment with respondent and provided timely notice. Respondent asserted the evidence and deposition testimony of Drs. Greene and Hufford prove claimant sustained a single traumatic accident that occurred on August 22, 2014. Respondent argues notice provided by claimant on September 23, 2014, was not timely. Respondent also alleged claimant was terminated for cause and was not entitled to temporary total disability (TTD) benefits.

The issues are:

1. Did claimant sustain an injury by accident or an injury by repetitive trauma?
2. Did claimant provide timely notice as required by K.S.A. 2013 Supp. 44-520(a)?
3. Does the Board have jurisdiction to determine if claimant is entitled to TTD benefits?

#### **FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

The facts set forth in the Board's January 12, 2015, Order are incorporated by reference herein.

Dr. Greene testified he first saw claimant on September 3, 2014, and treated claimant with chiropractic adjustments. On September 18, 2014, Dr. Greene saw claimant a second time. Claimant reported his back pain lasted two weeks after his first visit, but started feeling better on September 17, 2014. According to Dr. Greene, claimant also reported new left leg symptoms. On September 22, 2014, claimant reported severe shooting left leg pain, which was a new symptom that began the prior two to three weeks. The next day, September 23, 2014, Dr. Greene ordered an MRI, which showed claimant had a large central and left paracentral focal disc extrusion at L5-S1. Dr. Greene testified,

“So I believe he did have a repetitive injury that caused that leg pain to begin somewhere before the 18th.”<sup>1</sup>

At the request of his counsel, claimant was evaluated by Dr. Hufford on October 7, 2014. Dr. Hufford testified claimant reported that on August 22, 2014, he was aligning columns by squatting down, wrapping his arms around the columns and lifting them. Claimant had some back pain and sought chiropractic treatment. According to Dr. Hufford, claimant described a second day, September 18, 2014, when he had a significant change in the quality and severity of his low back pain. Claimant related bending, stooping, lifting, twisting and turning in various ways when installing a roof. The doctor testified the qualitative change was a left leg radicular component. When asked if claimant sustained a repetitive injury, Dr. Hufford testified, “Well, I think that there was a strong repetitive component to this. My suspicion was, although he did not relate this to me nor can I prove it definitively . . . was that at some point during that time the actual acute disc herniation occurred.”<sup>2</sup>

Dr. Hufford indicated an MRI showed an acute left eccentric disc herniation. The disc was fragmented and there was significant compression of the S1 nerve root on the left side. The doctor opined the disc herniation probably occurred on September 18, 2014. He testified, in part:

It certainly occurred to me that the possibility of a disc herniation on that date [August 22, 2014] may be in question. However, I did not feel that the symptoms that he described to me during that time could sufficiently and by themselves account for what the MRI showed alone without some type of progression or another superimposed injury. Therefore, the day when he was working on the roof, September 18th, which I actually opined was the day I believe the disc herniated, I also took a careful history of what his activities were on that day and I noted that this involved repetitive bending, twisting, stooping and other activities which involve axial torsion. And many people believe that axial torsion is actually a more significant and potential way to create a herniated disc. So just by my own style, my own reasoning and how I go about things, I arrived at the conclusion that I felt that it was more likely than not that the actual herniation occurred on that date rather than the August 22nd date.<sup>3</sup>

At the March 11, 2015, preliminary hearing, respondent introduced an e-mail dated October 6, 2014, from Ryan Snodgrass, the other foreman who worked with claimant on August 22. The e-mail, addressed to Jason Shallenberger, indicated Mr. Snodgrass first heard about claimant’s workers compensation claim on September 25, 2014, and he did

---

<sup>1</sup> Greene Depo. at 10.

<sup>2</sup> Hufford Depo. at 10.

<sup>3</sup> *Id.* at 27-28.

not previously know about any injury. Claimant objected to the e-mail as hearsay. The ALJ denied the objection. The ALJ indicated that on August 22, 2014, claimant testified he reported his injury to lead man Joshua Smith, salesman Josh Noel and Mr. Snodgrass.

#### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>4</sup> “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”<sup>5</sup>

K.S.A. 2013 Supp. 44-508, in part, provides:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

---

<sup>4</sup> K.S.A. 2013 Supp. 44-501b(c).

<sup>5</sup> K.S.A. 2013 Supp. 44-508(h).

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2013 Supp. 44-520(a), in part, states:

(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

The testimony of Drs. Greene and Hufford and additional exhibits do not persuade this Board Member that claimant sustained a single traumatic personal injury by accident on August 22, 2014. Dr. Hufford's explanation as to why he felt claimant's repetitive activities on September 18, 2014, caused claimant's herniated disc is logical and persuasive. Dr. Greene testified claimant sustained a work-related injury by repetitive trauma.

For reasons set forth in the Board's January 12, 2015, Order, this Board Member remains convinced claimant's date of injury is September 22, 2014.

This Board Member finds claimant provided respondent notice of injury on August 22, 2014, and September 23, 2014. In her March 12, 2015, Order for Medical Treatment, the ALJ indicated claimant notified Mr. Snodgrass of his injury on August 22, 2014. This Board Member concurs. The October 6, 2014, e-mail from Mr. Snodgrass is not persuasive. As stated in the Board's January 12, 2015, Order, Mr. Snodgrass' name was denoted as foreman and he was responsible for time cards and everyone getting paid. That proves Mr. Snodgrass was the lead foreman on August 22, 2014. Under respondent's policy, it was Mr. Snodgrass' duty to notify Mr. Hizar and Mr. Durst of claimant's low back injury. There is insufficient evidence respondent had a written policy for reporting work injuries, because a written policy was not placed into evidence.

Even if claimant did not provide notice on August 22, 2014, he did so on September 23, 2014. On that date, claimant completed an accident report for respondent, thus satisfying the requirements of K.S.A. 2013 Supp. 44-520(a).

Respondent asserts claimant was terminated for cause and is not entitled to TTD benefits. Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2013 Supp. 44-551 and issues listed in K.S.A. 2013 Supp. 44-534a(a)(2) as jurisdictional issues. “Certain defenses” refer to defenses which dispute the compensability of the injury.<sup>6</sup>

The Board does not have jurisdiction to review the ALJ’s decision to award claimant TTD benefits. The ALJ did not exceed her jurisdiction in determining payment of TTD benefits was appropriate for what is otherwise a compensable injury. Whether a claimant was terminated for cause, and is thus not entitled to TTD benefits, is not a jurisdictional issue listed in K.S.A. 2013 Supp. 44-534a(a)(2). That statute grants an ALJ jurisdiction to decide issues concerning payment of medical compensation and TTD compensation.

“Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.”<sup>7</sup> “Since the review requested by claimant does not raise an issue of compensability enumerated in K.S.A. 2013 Supp. 44-534a[(a)](2), and there has been no showing the ALJ exceeded his authority, the application for Board review must be dismissed for lack of jurisdiction.”<sup>8</sup> Therefore, respondent’s appeal on the issue that claimant is not entitled to TTD benefits because he was terminated for cause is dismissed.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>10</sup>

---

<sup>6</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>7</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

<sup>8</sup> *Willis v. Clearview City*, No. 1,067,116, 2014 WL 1340598 (Kan. WCAB Mar. 24, 2014); see also *Ramirez v. Murfin Drilling Co., Inc.*, No. 1,061,372, 2014 WL 889872 (Kan. WCAB Feb. 10, 2014); *Beaver v. Spangles*, No. 1,067,204, 2014 WL 517253 (Kan. WCAB Jan. 16, 2014); and *Dominguez-Rodriguez v. Amarr Garage Doors*, No. 1,058,613, 2012 WL 1652979 (Kan. WCAB Apr. 24, 2012).

<sup>9</sup> K.S.A. 2013 Supp. 44-534a.

<sup>10</sup> K.S.A. 2013 Supp. 44-555c(j).

**WHEREFORE**, the undersigned Board Member dismisses for lack of jurisdiction respondent's appeal that claimant is not entitled to temporary total disability benefits and affirms the other orders issued by ALJ Fuller in the March 12, 2015, Order for Medical Treatment.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2015.

---

HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant  
walter@griffithlaw.kscoxmail.com

James P. Wolf and Samantha Benjamin-House, Attorneys for Respondent and its Insurance Carrier  
jwolf@mvplaw.com; sbenjamin@mvplaw.com; mvpkc@mvplaw.com

Honorable Pamela J. Fuller, Administrative Law Judge